TEOH POH KEONG SDN BHD

v.

SHINHAN ENGINEERING & CONSTRUCTION CO LTD

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
RICHARD MALANJUM J
[SUIT NO: K22-97-1999]
4 DECEMBER 2000

CIVIL PROCEDURE: *Appeal - Interlocutory order - Appeal to judge in chambers - Whether available - Whether all interlocutory judgments, orders, decisions and rulings unappealable - Element of finality - Final disposal of rights - Whether SAR's ruling indeed interlocutory and not final - Rules of the High Court 1980, O. 56 r. 1 - Courts of Judicature Act 1964, s. 3*

WORDS & PHRASES: *"Judgment" - Rules of the High Court 1980, O. 56 r. 1 - Courts of Judicature Act 1964, s. 3*

WORDS & PHRASES: *"Order" - Rules of the High Court 1980, O. 56 r. 1 - Courts of Judicature Act 1964, s. 3*

WORDS & PHRASES: *"Decision" - Courts of Judicature Act 1964, s. 3 - Rules of the High Court 1980, O. 56 r. 1*

The defendant secured a contract with one Alpha Agencies Sdn Bhd ('Alpha') for the purpose of constructing a proposed hotel cum office complex.

As the main contractor, the defendant engaged sub-contractors of which one was the plaintiff. A dispute arose between the defendant and Alpha whereby the defendant terminated the contract on the ground that Alpha could not meet its payments to the defendant. This resulted in ongoing arbitration proceedings between the defendant and its principal.

Meanwhile, the plaintiff having carried out in stages its part of the bargain submitted its claims for certification of work done. Such claims were duly certified and the outstanding totalled RM308,571, the sum the plaintiff was suing the defendant for.

The plaintiff having encountered difficulty in serving the writ, applied for leave to serve such writ by way of substituted service and such leave was granted. Service of the writ was duly carried out by way of advertisement in the Daily Express, a local daily. This was met by the defendant applying

for leave to enter conditional appearance which was duly granted. Having taken such a step the defendant then proceeded to file an application to set aside the order granting leave for substituted service of the writ. The learned senior assistant registrar allowed the application. Hence this appeal.

The issue for consideration was whether the appeal was competent.

Held:

[1] Order 56 r. 1 of the Rules of the High Court 1980 ('RHC') provides that an appeal shall lie to a judge in chambers from any judgment, order or decision of the registrar. According to s. 3 of the Courts of Judicature Act 1964 ('CJA'), the word 'decision' means judgment, sentence or order but does not include any ruling made in the course of a trial or hearing in any cause or matter which does not finally dispose of the rights of the parties.

[2] The words 'judgment' and 'order' in O. 56 r. 1 of the RHC should not be given a general or expanded meaning. Instead, they should be restricted to the less general meaning assigned to the word 'decision' in the CJA. Whether it is a judgment, decision or order pronounced by a court, there must be an element of finality before there can be an appeal.

[3] Not all rulings, judgments or orders of a registrar are appealable to a judge in chambers. The element of finality in the disposal of the rights of the parties must be present in such a ruling, judgment, order or decision, particularly where there is no exercise of discretion involved. Accordingly, an interlocutory judgment, order, ruling or decision is not appealable.

[4] The ruling of the senior assistant registrar should not be categorised as having the effect of finally disposing of the rights of the parties in the action. The action itself is still there and it should now be the move of the plaintiff to do the necessary so as to enable it to properly serve the writ upon the defendant in compliance with the RHC and other relevant laws. Clearly, therefore, the ruling of the senior assistant registrar complained of is interlocutory in nature and thus not appealable in view of the present position of the law.

[Appeal dismissed.]

Case(s) referred to:

Central Securities (Holdings) Bhd v. Haron Mohamed Zaid [1980] 1 MLJ 304 ***(refd)***

Dato' Seri Anwar Ibrahim v. PP [1999] 1 CLJ 537 ***(foll)***

Haron Mohd Zaid v. Central Securities (Holdings) Bhd [1982] CLJ 293

Mohd Dalhar Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur [1995] 2 CLJ 209 ***(refd)***

Saad Abas & Anor v. PP [1998] 4 CLJ 575 ***(foll)***

Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 ***(dist)***

Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor [1998] 3 CLJ 85 ***(foll)***

Tio Chee Hing & Ors v. Government of Sabah [1982] 1 MLJ 138 ***(refd)***

Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd [1999] 3 CLJ 377 ***(dist)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 3, 4, 67(1)

Rules of the High Court 1980, O. 2 r. 2, O. 12 r. 7, O. 56 r. 1

For the plaintiff - Baldev Singh; M/s Lee & Kong

For the defendant - Colin Lau; M/s Colin Lau & Co

Reported by Mariette Peters-Goh

JUDGMENT

Richard Malanjum J:

On 18 October 2000 I dismissed with costs the appeal by the plaintiff after its counsel conceded that the decided cases were not helpful to the issue of whether the appeal was competent in view of the provision pertaining to the definition of the word 'decision' in the amended s. 3 of the Courts of Judicature Act 1964 (CJA).

Though such an issue was not raised by either of the learned counsel I posed such a question to them for consideration in the hope that the mischief of which the amendment could have intended to address might be determined. Unfortunately learned counsel for the plaintiff did not provide much assistance to the court even after being granted an adjournment to study the issue. And his concession gave me the impression that indeed he agreed that the appeal was not competent in the light of the relevant provision of the said s. 3 and thus did not wish to proceed. Hence, I had no other option but to dismiss the appeal. However, as there is now a notice of appeal filed this is therefore my ground in dismissing the appeal.

Briefly, the appeal came up against the ruling of the learned senior assistant registrar (SAR) allowing the application of the defendant to set aside (i) the order granting the plaintiff leave to serve the writ of summons on the defendant by way of substituted service and (ii) the service of the said writ itself upon the defendant. And the only reason for the defendant to make such an application was that the defendant and one Kwak Hyung Min were no longer conducting business or residing in Malaysia when the writ was issued and/or served and hence were out of jurisdiction of the Malaysian Courts. It is to be noted that it is not a case of striking out of the writ itself.

By way of background facts the defendant is a foreign company that came to Sabah when it secured a contract with Alpha Agencies Sdn. Bhd. in November 1995 to construct a proposed hotel cum office complex along Jalan Tun Fuad, Kota Kinabalu, Sabah, to be known as the Ramada Renaissance Hotel. As the main contractor the defendant engaged sub-contractors of which one of them was the plaintiff. And the purpose of appointing the plaintiff was to carry out renovation works on the 7th to 15th levels inclusive at total costs of RM2,266,739.50. Unfortunately the defendant averred that its principal namely, Alpha Agencies Sdn. Bhd. could not meet the payments to the defendant thereby leaving it with no option but to terminate the contract. That resulted in an ongoing arbitration proceeding between the defendant and its principal. Meanwhile, the plaintiff having carried out in stages its part of the bargain submitted claims for certification of works done. Such claims were duly certified and the total outstanding came up to RM308,571 and that is the sum the defendant is sued for by the plaintiff. But having filed the writ the plaintiff or its solicitors encountered difficulty in serving it. Hence, an application for leave to serve by way of substituted service was applied for and duly granted. Thereafter service of the writ was duly carried out by way of advertisement in the Daily Express, a local daily. That was met by the defendant applying for leave to enter conditional appearance that was duly granted. Having taken such a step the defendant then proceeded to file an application to set aside the order granting leave for substituted service of the writ. To that the learned SAR allowed the application and hence this appeal.

Now s. 3 of CJA, as amended, defines the word 'decision' thus:

> "decision" means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

And O. 56 r. 1 of the Rules of the High Court 1980 provides:

> 1. Appeals from certain decisions of Registrar to Judge in Chambers. (O. 56 r. 1)
>
> (1) An appeal shall lie to a judge in chambers from **any judgment, order** or **decision** of the registrar. (emphasis added).

At a glance it is obvious that it is not only the word 'decision' that appears in the said order but that it is preceded by the words 'judgment' and 'order'. And there is no definitions for the words 'judgment' or 'order' in CJA. Neither is there any definition for any of those words in the Rules of the High Court 1980. In any event no conflicting definition should be expected in view of s. 4 of CJA that provides:

> 4. Provision to prevent conflict of laws.
>
> In the event of inconsistency or conflict between this Act and any other written law other than the Constitution in force at the commencement of this Act the provisions of this Act shall prevail.

Thus I would think that resort should be made to the relevant definition as available in CJA. But there only the word 'decision' has been ascribed with a meaning. As such one may argue that the words 'judgment, order or decision' as found in the said O. 56 r. 1 should be read disjunctively thereby allowing appeal to proceed against any judgment or order made by the registrar regardless of it being interlocutory or final in nature. However, if that approach is adopted then the very mischief, that is, the filtration of appeals, probably intended to be addressed when amending the definition of the word 'decision' under s. 3 of CJA, would be missed. Thus, I do not think the 'disjunctive' approach is in tandem with the legislative intent. Further, the meaning of words grouped together should 'take as it were their colour from each other'. His Lordship Gopal Sri Ram JCA in the case of *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 CLJ 85 had this to say at p. 113:

> We refer, of course, to the time honoured guideline of contextual interpretation housed in the maxim *noscitur a sociis* which was explained by Gajendragadkar J, in *The State of Bombay & Ors v. The Hospital Mazdoor Sabha & Ors* AIR [1960] SC 610 at p. 613 as follows:
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> > This rule, according to Maxwell, means that, when two or more words which are susceptible of analogous meaning are coupled together they are understood to be used in their cognate sense. They take as it were their colour from each other, that is, the more general is restricted to a sense analogous to a less general. The same rule is thus interpreted in *Words and Phrases* (Vol 14) at p. 207:

> Associated words take their meaning from one another under the doctrine of *noscitur a sociis*, the philosophy of which is that the meaning of the doubtful word may be ascertained by reference to the meaning of words associated with it; such doctrine is broader than the maxim *ejusdem generis.*
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> In fact, the latter maxim 'is only an illustration or specific application of the broader maxim *noscitur a sociis*'. … It must be borne in mind that *noscitur a sociis* is merely a rule of construction and it cannot prevail in cases where it is clear that the wider words have been deliberately used in order to make the scope of the defined word correspondingly wider. It is only where the intention of the legislature in associating wider words with words of narrower significance is doubtful, or otherwise not clear that the present rule of construction can be usefully applied.
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> In *Rohit Pulp & Paper Mills Ltd v. Collector of Central Excise, Baroda* AIR [1991] SC 754 at p 762, Ranganathan J, when delivering the judgment of the Indian Supreme Court observed that the principle of construction housed in the maxim *noscitur a sociis* 'has been applied in a number of contexts in judicial decisions where the court is clear in its mind that the larger meaning of the word in question could not have been intended in the context in which it has been used'. (emphasis added).

Accordingly in my view the words 'judgment or order' in the said Order should not be given a general or expanded meaning. Instead they should be restricted to the less general meaning assigned to the word 'decision' in the CJA. I am fortified in coming to such a conclusion by what the Court of Appeal said in the case of *Saad bin Abas & Anor v. Public Prosecutor* [1998] 4 CLJ 575 at p. 586:

> The other point is that the present s. 50(2) employs the word 'decision' while s. 50(3A)(i) employs the word 'order'. We do not think that they merit any lengthy discussion in view of the context in which they are being used. However, to refresh our memory, we take the liberty to refer to *Wharton's Law Lexicon* (14th Ed) at p. 305 for the meaning of the word 'decision' and it gives us the meaning simply as 'a judgment'. For the word 'judgment' at p. 545, it means 'judicial determination: decision of a court.' It also gives some background history as to the usage of the word and also mentions species of judgments such as 'interlocutory' and 'final'. For our present purpose, we are satisfied and it is sufficient with its meaning as 'judicial determination: decision of a court.' As for the word 'order' at p. 718, it gives the meaning as 'mandate, precept, command' while for the word 'precept' it gives at p. 789 as 'rule authoritatively given; a mandate.' Whitton J in the case of *Gng Eng Hwoo v. R* [1954] MLJ 256 attempted to look for the definition of the word 'order' appearing in s. 296 of the Singapore Criminal Procedure Code. Section 296 reads:

(1) No appeal shall lie from a judgment, sentence or order of a criminal Court except as provided for by this Code or by any other law for the time being in force.

(2) No appeal shall lie from a judgment, sentence or order of a Police Court in any of the cases specified in Schedule 'C'.

The learned judge had this to say at p. 257:

> I have been unable to find any definition of the word 'order' which appears to fit its use in this section, but my research into the matter has led me to the conclusion that in connection with a criminal cause or matter the word is confined, broadly speaking, to those final decisions of a court which affect parties to the proceedings in respect of their person or property.

Whether it is a judgment, decision or order pronounced by a court, there must be an element of finality before there can be an appeal.

Now we may recall s. 50(2) of the Courts of Judicature Act 1964, it employs the word 'decision' which is defined in s. 3. Early this year, by Amendment Act A1031 of 1998, that definition was amended to read:

> 'decision' means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

So, for the purpose of s. 50(2), this court has to first ascertain whether the 'decision' of the High Court in ordering the applicants before us to enter on their defence was a ruling that had the effect of finally disposing of their rights. Certainly not, and it would only happen after a decision had been made at the close of the defence. (emphasis added).

On the other hand I am well aware of what the Court of Appeal opined in the case of *Tycoon Realty Sdn Bhd v. Senwara Development Sdn Bhd* [1999] 3 CLJ 377. However there the court was concerned with a specific provision only applicable to that court. Indeed s. 67(1) of CJA states:

> The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought. (emphasis added).

As may be noted the word 'decision' is not in the company of the words 'judgment or order' in the said section. His Lordship NH Chan JCA at p. 382 of the case in fact mentioned that:

> It is to be noted that the word 'decision' is not used in s. 67(1), so that, there is no compelling reason to refer to s. 3 of the Act for its meaning as is in the case of criminal appeals. That being so, the Court of Appeal has jurisdiction to hear appeals 'from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction'. The phrase 'from any judgment or order' is not to be restricted to the meaning given to the word 'decision' in the current version of s. 3. This is because, in s. 67, civil appeals to the Court of Appeal are from 'any judgment or order' of any High Court, whereas, in the case of criminal appeals they are against 'any decision' made by the High Court. There is no compelling reason to extend the meaning of the words 'any judgment or order' to mean a judgment or order which would finally dispose of the rights of the parties. It is not the business of a court of law to put words into a statutory provision which are not there because to do so would be intruding into the domain of the legislature. (emphasis added).

Another approach that may be viable is to say that an appeal from the registrar to a judge in chambers is in fact not an appeal *per se* but a rehearing. Hence, the issue of whether a ruling of the registrar is an interlocutory or final does not arise. The case of *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716 may come to mind where his Lordship Edgar Joseph Jr. SCJ at pp. 723-724:

> In *Blundell v. Rimmer*, 4 Payne J when considering an appeal from an order of the district registrar giving leave to sign interlocutory judgment in an action for negligence, had occasion to refer to Lord Atkin's speech in *Evans v. Bartlam* 2 in these terms (at p. 1076):
>
> > I understand that the arguments before me ranged over a wider ground than those advanced by the parties' solicitors to the district registrar, and it was contended by counsel for the plaintiff that I was fettered by the proceedings before the district registrar and confined to the arguments which were presented to him; that no point could be raised before me which was not raised below. It is, I think, clear on authority that the appeal from the district registrar is a rehearing of the application and I am entitled to treat the matter as though it comes before me for the first time; moreover, that I am not fettered by the previous exercise of the district registrar's discretion, although I should, of course, give to it the weight which it deserves. Authority can be found for this proposition in the speech of Lord Atkin in *Evans v. Bartlam* and in the notes in 1 *The Supreme Court Practice* 1970 at p. 759 para 58/1/2, p. 762 para 58/4/1, under RSC O. 58 rr. 1 and 4.

In the Singapore High Court case of *Herbs and Spices Trading Post Pte Ltd v. Deo Silver (Pte) Ltd*, 5 a similar point was made by Chan Sek Keong J in these terms (at p. 313 col 2C-E):

> The situation in O. 55 is analogous to 'appeals' from the decisions of the registrar of the High Court to the judge-in-chambers. In such appeals, the judge-in-chambers is not exercising 'appellate' jurisdiction in the same sense when it hears appeals from the district court. This view is consistent with the rule that an appeal from the registrar of the High Court to the judge-in-chambers is by way of an actual rehearing of the application and the judge treats the matter afresh as though it came before him the first time ...

With Lord Atkin's observations in mind, the first point we should like to make is that since the registrar gave no judgment but only a bare decision, or in other words, a simple *ipse dixit*, it deserved no weight at all. Yet, it is obvious that the judge gave some weight to the decision of the registrar.

The second point we should like to make is that the judge did mention in passing – in our view quite correctly – that though the matter before him was in form an appeal, it did 'take the shape and style of rehearing ...'. However, in his approach to the questions for decision, he treated the appeal, in the fullest sense, as an appeal from a discretionary order made by the registrar.

In other words, it looks very much as though the judge's approach was that he should not interfere with the registrar's exercise of discretion unless it was shown that the discretion had been exercised on a wrong principle or not at all, or that there had been a miscarriage of justice. In other words, as an appellate judge, he was not to exercise an independent discretion of his own, but had to defer to the registrar's exercise of his discretion and could not interfere with it merely on the ground that he would have exercised it differently. (See *37 Halsbury's Laws of England* (4th Ed) para 656 at p 493.) In adopting this approach, the judge was wrong, the appeal before him being from the registrar by way of an actual rehearing.

I have given anxious consideration as to the merit of such an approach and it is my humble view that in *Seloga Jaya Sdn. Bhd.*'s case *(supra)* his Lordship was addressing an issue where an exercise of discretion was involved. This was what he said earlier at p. 723:

Now, in *Evans v. Bartlam,* 3 Lord Atkin said this (at p 478):

> The power to set aside a judgment obtained on default of appearance is given to the court or a judge under O. XII r. 10; and a similar power extending to judgments by default under any rule is given by O. XXVII r. 15. It is a power entrusted to the discretion of the court or judge, and by O. LIV r. 12, the Master is given jurisdiction to exercise the discretion.

As to the limits of the discretion, if any, it may be necessary to say a word or two later. I stay only to mention a contention of the respondent that the Master having exercised his discretion, the judge-in-chambers should not reverse him unless it was made evident that the Master has exercised his discretion on wrong principles. I wish to state my conviction that where there is a discretionary jurisdiction given to the court or a judge, the judge-in-chambers is in no way fettered by the previous exercise of the Master's discretion. His own discretion is intended by the rules to determine the parties' rights: and he is entitled to exercise it as though the matter came before him for the first time. He will, of course, give the weight it deserves to the previous decision of the Master: but he is in no way bound by it. This, in my experience, has always been the practice in chambers, and I am glad to find it confirmed by the recent decision of the Court of Appeal in *Cooper v. Cooper* [1936] WN 205, with which I entirely agree.

Two things are plain from the above passage in the judgment of Lord Atkin, namely:

(1) in an appeal from a discretionary order of the Master (equivalent here to a senior assistant registrar) to a judge-in-chambers, the judge exercises his own discretion as though the matter comes before him for the first time, unfettered by the previous exercise of the Master's discretion; and

(2) so far as the Master's decision is concerned, the judge will give it the weight it deserves.

In the present case the application before the SAR was made under O. 2 r. 2 and O. 12 r. 7 of the Rules of the High Court 1980.

Order 12 r. 7 reads:

7. Application to set a side writ, etc. (O. 12 r. 7)

(1) A defendant to an action may at any time before entering an appearance therein, or if he has entered a conditional appearance, within 14 days after entering the appearance, apply to the Court for an order setting aside the writ or service of the writ, or notice of the writ, on him, or declaring that the writ or notice has not been duly served on him or discharging any order giving leave to serve the notice on him out of the jurisdiction.

(2) An application under this rule must be made by summons.

Thus, where a defendant managed to establish to the satisfaction of the SAR that indeed he had not been properly served with the writ, I do not think there would be any question of exercising discretion on the part of the SAR whether or not to set aside the writ or the service of it.

Accordingly, in my view any ruling of a nature as in this present case where the exercise of discretion does not arise, appears to be caught by the effect of the current definition of the word 'decision' in s. 3 of CJA. In passing I also noted that *Seloga Jaya Sdn. Bhd. (supra)* was decided well before the amendment to the definition of the word 'decision' was passed. The impact of the current definition, if at all relevant to the issue before their Lordships, was therefore not addressed.

As such it is my judgment that not all ruling, decision, judgment or order of a registrar (which include a Deputy and senior assistant registrar) is appealable to a judge in chambers. The element of finality in the disposal of the rights of the parties must be present in such ruling, judgment, order or decision, particularly where there is no exercise of discretion involved. Accordingly, an interlocutory judgment, order, ruling or decision is not appealable. I am very much aware that what I have said here may appear to be hair-splitting. But I cannot ignore the fact that there is the amended version of the definition of the word 'decision' in s. 3 of CJA and the probable legislative intent for such an amendment. Further, indeed O. 56 r. 1 speaks of an 'appeal' to begin with. And in my view *Seloga Jaya Sdn. Bhd. (supra)* should not be read as having amended the provision, but only provided a guideline in approaching such an appeal particularly where discretion is involved.

Next is the determination of whether an order, judgment, ruling or decision is final or interlocutory. There had been serious discussions of this point in several cases reported in our law journals. In the case of *Central Securities (Holdings) Bhd v. Haron bin Mohamed Zaid* [1980] 1 MLJ 304 his Lordship Chang Min Tat FJ had this to say at p. 306:

> The real bait offered by Mr. George is however a temptation to refer to the Privy Council for decision as to the proper test to apply to decide when a judgment or order is final and when it is interlocutory. The courts in England have tended to differ in their views of what is the proper test to be applied. One test considers the nature of the application in which the order is made. It was applied in this form in *Salaman v. Warner* [1891] 1 QB 734 and has come to be known as the Salaman test, but it was actually first formulated by Lord Esher M.R. (then Brett LJ) in *Standard Discount Co v. La Grange* [1877] 3 CPD 67. As Du Parcq LJ put it in *Egerton v. Shirley* [1945] KB 107, 110 at p. 110, **an order is an interlocutory order unless made on an application of such a character that whatever order had been made therefrom must finally have disposed of the matter in dispute.** The other test stated by Lord Alverstone C.J. in *Bozson v. Altrincham Urban District Council* [1903] 1 KB 547 and known as the Bozson test is: **if the judgment or order as made finally disposes of the rights of the parties, it is a final order, otherwise it is an interlocutory order.** See *Tampion v. Anderson* [1974] 48 ALJR 11, 12 at p. 12.

En passant, it is not without interest to note that Lord Denning M.R. who applied the Salaman test had himself admitted that Lord Alverstone C.J. was right in logic but he claimed that Lord Esher M.R. was correct in experience: *Salter Rex & Co v. Ghosh* [1971] 2 QB 597, 601 at page 601.

The conflict in the English judicial decisions may never be resolved by the House of Lords since under section 68(2) of the Supreme Court of Judicature (Consolidation) Act, 1925, any doubt arising as to what orders are final and what are interlocutory is to be determined by the Court of Appeal. No similar inhibition exists to prevent this question of the correct test from being decided by the Privy Council from Malaysia. Mr. George for *Haron* says that our Malaysian Courts have in *Peninsular Land Development Sdn Bhd v. K Ahmad (No. 2)* [1970] 1 MLJ 253 FC and in *Hong Kim Sui v. Malayan Banking Berhad* [1971] 1 MLJ 289 FC adopted the Bozson test in preference to the Salaman test, wrongly as it now turns out having regard to the later decisions of the Privy Council in *Becker v. Marion City Corporation* [1976] 2 WLR 728 PC and *Tampion v. Anderson, supra,* and we should now send the matter up for final determination.

In *Becker*'s case, an order was made to the effect that the applicant was not entitled to require the local council to examine her proposed plan for subdivision lodged subsequently with the director and her right to appeal to Her Majesty in Council depended on whether their decision was a final judgment. Their Lordships in considering her application for special leave held that it was a final judgment since the negative answer to the question produced a state of finality and approved the judgment of Hogarth J in the Supreme Court of South Australia in [1974] 9 SASR 560 at p. 562, that

> for the purpose of these proceedings, I think that the order of the court was final. It finally decided the question whether or not the plaintiff was entitled to have her plan considered by (the Council). That was the lis; and that was finally determined adversely to her. Whichever way the decision went it was a final decision as between the parties. I think therefore that the judgment is a final judgment.

The issue whether the judgment was final and interlocutory was therefore decided by the finality effect. But the order was also made on an application of such a character that whatever order had been made therefrom must finally have disposed of the matter in dispute. Whatever the test that is applied, the order is a final order.

In *Tampion v. Anderson, supra,* the question was whether an order staying an action on the ground that it was frivolous and vexatious and an abuse of the process of the court is an interlocutory judgment. In holding that it was, their Lordships of we Privy Council referred to the continuing controversy between *Bozson* and *Salaman,* thought the attempt to frame a definition difficult and declined to do so. They adopted the suggestion of Lord Denning M.R. in *Salter Rex & Co. v. Ghosh, supra,* at p. 601 when

he said "This question of final or interlocutory is so uncertain that the only thing for practitioners to do is to look up the practice books and see what has been decided on the point. Most orders have now been the subject of decision." In their Lordships' opinion, this advice, even if it be distressing to the scientific lawyer, might nevertheless be the most helpful in any actual case. And, doing precisely that, they found a consistent line of authority to the effect that such an order is an interlocutory judgment, in *In re Page, Hill v. Fladgate* [1910] 1 Ch 489; *Price v. Phillips* [1894] 11 TLR 86; *Hunt v. Allied Bakeries Ltd* [1956] 1 WLR 1326 and the *dictum* of Lord Denning M.R. in *Salter Rex & Co. v. Ghosh, supra.*

Where they had refused to do so in *Tampion v. Anderson, supra*, it appears unlikely that their Lordships of the Privy Council would now agree to give a definition of final or interlocutory in this case if we were to succumb to the temptation offered us by Mr. George. In all probability, we would be told, go back to the practice books, as they did.

But before doing so, it is not without interest to note that the decision in *Salter Rex & Co. v. Ghosh, supra*, would have been the same whichever test was applied. Perhaps it was for this reason that Lord Denning M.R. made the suggestion of going back to the practice books.

And so far as we can discover, apart from the view of Lord Denning M.R. in *Salter Rex & Co. v. Ghosh* that an Order 14 judgment is interlocutory, there is only one other possibly applicable case which holds a judgment on admissions of fact is interlocutory: *Technistudy Ltd v. Kelland* [1976] 1 WLR 1042; [1970] 3 All ER 632.

But this court has, in *Ratnam v. Cumarasamy & Anor* [1962] MLJ 330, after reviewing the various cases, come to the conclusion that the test laid down in *Bozson* has been approved and followed in the Court of Appeal in England in subsequent cases though not in In re Page, supra. And it has in *Peninsular Land Development Sdn. Bhd. v. K. Ahmad (No. 2), supra*, and in *Hong Kim Sui & Anor. v. Malayan Banking Berhad, supra*, preferred the Bozson test to the Salaman test and held that an order giving leave to sign final judgment is a final and not an interlocutory judgment.

In the absence of any of the exceptions stated in *Young v. British Aeroplane Co Ltd* [1944] KB 718 CA, we are bound to follow these two decisions. But even if we believe that they have been wrongly decided and not merely *per incuriam* (see the definition by Lord Goddard C.J. in *Huddersfield Police Authority v. Watson* [1947] 1 KB 842 at p. 847), we would heed the admonition given by the House of Lords in *Davis v. Johnson* [1978] 2 WLR 553; [1978] 1 All ER 1132 that in such a case we should follow our previous decisions and leave the matter to be corrected on appeal as being the most convenient and quickest way of having the law determined. (emphasis added).

(see: *Haron bin Mohd Zaid v. Central Securities (Holdings) Bhd* [1982] CLJ 293 where the Privy Council did not interfere in the adoption by the then Federal Court of the Bozson test).

In another case of *Tio Chee Hing & Ors v. Government of Sabah* [1982] 1 MLJ 138 his Lordship Sulaiman FJ also expressed his view of the test to be applied in determining the nature of an order when he said thus at p. 139:

> Commencing with the decision of this court in *Ratnam v. Cumarasamy & Anor* [1962] MLJ 330 the test applied by Lord Alverstone C.J. in *Bozson v Altrincham Urban District Council* [1903] 1 KB 547, now known as the Bozson test has been preferred by our courts to that applied in *Salaman v. Warner* [1891] 1 QB 734 (the Salaman test). Put briefly the Bozson test is: *Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then it ought to be treated as a final order, but if it does not, then it is an interlocutory order.* (emphasis added).

Further observation on the issue was made by the Court of Appeal in the case of *Mohd Dalhar bin Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 2 CLJ 209 when his Lordship Shaik Daud JCA said this at p. 225:

> Lord Esher MR in *Salaman v. Warner* [1891] 1 KB 734, CA got round this obvious inequality in respect of consequences of the same application by looking at the nature of the application and not at the nature of the order made thereon. The basis of the Salaman test is that a judgment or order must be interlocutory in character unless it is made on an application which must operate in such a way that, whatever judgment or order is given or made on it, it must finally dispose of the dispute or controversy between the parties. In effect, even though an O. 14 judgment is obviously a final judgment in that it has finally disposed of the dispute between the parties, it would be in the test applied by Lord Esher, deemed to be interlocutory. A fiction was resorted to in the interest of equality of steps to be taken post-judgment or order, by the aggrieved party.
>
> In *Bozson v. Altrincham Urban District Council* [1903] 1 KB 546 at p 548, Lord Alverstone CJ in effect refused to apply the said fiction. The test he applied was to look at the order made and not at the nature of the application. If the order finally disposes of the rights of the parties it is final, but if it does not, then it is interlocutory. In Malaysia, the former Court of Appeal had in *Ratnam v. Cumarasamy & Anor* [1962] MLJ 330, applied the Bozson test. In 1971, Lord Denning MR in *Salter Rex & Co v. Ghosh* [1971] 2 QB 597; [1971] 2 All ER 865; [1971] 3 WLR 31 pointed out that although the Bozson test may be logical, 'Lord Esher's test has always been applied in practise'. He preferred and applied the Salaman test.

In the case from Malaysia, *Haron bin Mohd Zaid v. Central Securities (Holdings) Bhd* [1983] 1 AC 16; [1982] 2 MLJ 94 , the Privy Council though unhappy that the Bozson test had been applied had declined to interfere but only, it would seem, because the Federal Court had been applying the Bozson test and because it was a question of procedure and because there was a tradition in England of the House of Lords not interfering with the decisions of their Court of Appeal in respect of matters of procedure.

The White Book 1985 in dealing with the distinction between interlocutory and final orders states at para 59/1/15:

In deciding whether an order is final or interlocutory the Court of Appeal applies the test in *Salter Rex & Co v. Ghosh* [1971] 2 QB 597; [1971] 1 All ER 865 CA (*Steinway & Sons v. Broadhurst-Glegg* (The Times, 25 February 1983) CA; *White v. Brunton* (12 March 1984) (unrep) CA). To determine whether an order is final or interlocutory regard must be had to the nature of the application made in court below … (A different test was applied in *Bozson v. Altrincham UDC* [1903] 1 KB 547 (which was followed by the Privy Council in *Haron bin Mohd Zaid v. Central Securities (Holdings) Bhd* [1983] 1 AC 16; [1982] 2 All ER 481.) The Court of Appeal is now firmly committed to the Salter Rex test and does not apply the test adopted in *Bozson* and *Haron*; see *White v. Brunton,* above.

Eventually, in England, resort had to be made to statute to ensure that the inequality of the Bozson test was brought to an end. Section 18(2)(a) of the Supreme Court Act 1981 gave statutory approbation to the Esher fiction and provided that 'an order refusing unconditional leave to defend an action shall not be treated as an interlocutory order …

And in the recent case of *Dato' Seri Anwar bin Ibrahim v. Public Prosecutor* [1999] 1 CLJ 537 the Court of Appeal had the opportunity to consider the effect of the definition of the word 'decision' as presently defined in CJA as well as to provide a guideline on the nature of a decision that could be appealed against. And this is what his Lordship NH Chan JCA said at p. 549:

This new definition of 'decision', as in the amendment, does not include a judgment or order which does not deal with the final rights of the parties on the matters in dispute. In other words, what has been excluded from the meaning of the word 'decision' is the type of judgments and orders which is termed 'interlocutory' by 26 *Halsbury's Laws of England* (4th Ed) para 506 at p. 240, which reads:

> Interlocutory judgments and orders. An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed 'interlocutory'.
>
> An interlocutory order, even though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals.
>
> Shortly stated, what the amendment means is that a judgment or order which does not deal with the final rights of the parties, but is made *pendente lite*, and gives no final decision on the matters in dispute, is not a 'decision' within the meaning of that word in the current version of s. 3 of the Act, and therefore is not appealable. It makes no difference that such a judgment or order is final, that is to say conclusive, as to the subordinate matter with which it deals. For instance, an order granting or refusing bail is final (conclusive) as to the application with which it deals but it is still an order which does not deal with the final rights of the parties. Such an order is made before judgment or sentence and gives no final decision on the matters in dispute. A judgment or order, even though not conclusive (final) of the main dispute, may be conclusive (final) as to the subordinate matter with which it deals. In this way, an interlocutory judgment or order may be conclusive (final) as to the subordinate matter with which it deals even though it is not conclusive (final) of the main dispute.
>
> The real distinction is between (for want of a better word) what is called final judgments and orders and interlocutory judgments and orders. In general, a judgment or order which determines the principal matter in question is termed 'final': see *26 Halsbury's Laws of England*, para 505 at p 238. Actually, the use of the term 'final' is tautological as all judgments and orders are final. The term (final) is used for the purpose of distinguishing between judgments and orders and 'interlocutory' judgments and orders. The difference is that judgments and orders which are not termed 'interlocutory' judgments and orders are appealable under the new meaning of the word 'decision' as defined in s 3 by the 1998 amendment. *In other words, judgments and orders which determine the principal matter in question are termed 'final' judgments and orders, and they are appealable. But, those judgments and orders which give no final decision on the matters in dispute (which are termed 'interlocutory' judgments and orders) are now no longer appealable.* (emphasis added).

Turning therefore to the case at hand the thrust of the complaint of the plaintiff was that the learned SAR was wrong in allowing the application of the defendant to set aside the leave granted to serve the writ by way of substituted service and the service itself. Such ruling in my judgment should not be categorized as having the effect of final disposal of the rights

of the parties in the action. The action itself is still there and it should now be the move of the plaintiff to do the necessary so as to enable it to properly serve the writ upon the defendant in compliance with the prevailing Rules of the High Court 1980 and other relevant laws. Clearly therefore that the ruling of the SAR complained of is interlocutory in nature and thus not appealable in view of the present position of the law.

Accordingly, with costs the appeal was dismissed in limine.